



**Rule(s) Review Checklist Addendum**  
(This form must be filled out electronically.)

**This form is to be used only if the rule(s) was/were previously reviewed, and has/have not been amended/repealed subsequent to that review.**

All responses should be in **bold** format.

Document Reviewed (include title):     **WAC 458-20-211**  
  **Leases or rentals of tangible personal property,**  
  **bailment**

Date last reviewed:     **March 30, 1998**

Current Reviewer:     **JoAnne Gordon**

Date current review completed: **December 28, 2001**

Is this document being reviewed at this time because of a taxpayer or association request? (If "YES", provide the name of the taxpayer/association and a brief explanation of the issues raised in the request).   **YES** ☐   **NO** ☒

Type an "x" in the column that most correctly answers the question, and provide clear, concise, and complete explanations where needed.

**1. Briefly describe the subject matter of the rule(s):**

**WAC 458-20-211 discusses the application of business and occupation (B&O), retail sales, and use taxes to leases or rentals of tangible personal property. This includes the treatment of bare rentals of tangible personal property, the rental of equipment with operator, the rerenting of property, and when renting or leasing activities are subject to the public utility tax rather than the B&O tax. The rule explains the distinctions between a financing/capital lease and a true/operating lease, and the differing tax applications thereof. The rule discusses how use tax applies to situations involving bailed property. In addition, the rule provides several examples that identify a specific fact pattern and the applicable tax treatment.**

**2. Related statutes, interpretive statements, court decisions, BTA decisions, and WTDs:** (Excise Tax Advisories (ETAs), Property Tax Advisories (PTAs), Property Tax Bulletins (PTBs) and Audit Directives (ADs) are considered interpretive statements.)

| YES | NO       |   |
|-----|----------|---|
|     | <b>X</b> | Are there any statutory changes subsequent to the previous review of this rule that should be incorporated? |



|   |   |  |
|---|---|--|
| X |   | Are there any interpretive statements not identified in the previous review of this rule that should be incorporated? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)   |
| X |   | Are there any interpretive statements that should be repealed because the information is currently included in this or another rule, or the information is incorrect or not needed? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.) |
|   | X | Are there any Board of Tax Appeal (BTA) decisions, court decisions, or Attorney Generals Opinions (AGOs) subsequent to the previous review of this rule that provide information that should be incorporated into this rule?   |
| X |   | Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) subsequent to the previous review of this rule that provide information that should be incorporated into the rule?  |
|   | X | Are there any changes to the recommendations in the previous review of this rule with respect to any of the types of documents noted above? (An Ancillary Document Review Supplement should be completed if any changes are recommended with respect to an interpretive statement.)                |

If the answer is “yes” to any of the questions above, identify the pertinent document(s) and provide a brief summary of the information that should be incorporated into the document.

- **The following Excise Tax Advisories were reviewed in September, 2000 (after the previous rule review), with a recommendation that the information be incorporated in WAC 458-20-211:**
  - **ETA 135.04.211, Deductibility of Repair and Maintenance Costs of Leased Property**, explains that amounts paid by a lessee for repairs/maintenance and deducted from the rental payment may not be excluded from the measure of tax when the lessor is responsible for paying such amounts.
  - **ETA 337.08.211, Lease Cancellation Payment**, explains that amounts from a negotiated settlement arising from an early lease termination are taxable consideration.
  - **ETA 447.04.211, Rentals within and without Washington**, explains how tax applies to rentals of tangible personal property when use of the property occurs both inside and outside the state.
- **The following Excise Tax Advisories can simply be repealed:**
  - **ETA 158.08.211, Deduction of Finance Charges from Lease Payments**, explains that sales tax applies to amounts designated as finance charges when payments are made under a lease with an option to purchase. Such amounts are part of the total consideration paid. This document is correct, though it does not specifically explain that the lease at issue is a true lease with option to purchase.

**The previous review of this document recommended incorporating the**



information in Rule 211. Further review indicates that this document is not needed. The taxability of amounts designated as “interest” in both true and financing leases is addressed in a number of other documents. Examples include WAC 458-20-211 (Leases or rentals of tangible personal property, bailments), WAC 458-20-198 (Installment sales), and WAC 458-20-109 (Finance charges, carrying charges, interest, penalties).

- **ETA 357.04.211, Bailments: Handling and Cleaning Charges**, explains that amounts billed to bailees by bailors for handling items remain taxable under the service and other activities classification even though the items were serviced as necessary. The true object of the activity was the handling service, any cleaning activity was incidental.

The previous review of this document recommended that it be retained until the information could be incorporated into an appropriate rule. It is not a good fit for Rule 211 as the fact that the specific situation involved bailment is of no consequence for determining the tax result for these additional charges. A number of other documents explain that the Department frequently focuses on the “true object” of the transaction to determine the proper tax classification. Examples include: Det. No. 89-009A, 12 WTD 1 (1992) (discount memberships); Det. No. 94-115, 15 WTD 019 (1994) (food demonstrations); Det. 00-159E, 20 WTD 372 (2001) (transmission of data); and WAC 458-20-211. This document should simply be repealed.

- The following Washington Tax Decisions were published after the previous review of WAC 458-20-211. Consideration should be given to incorporating the information when the rule is reviewed.
  - Det. No. 99-330, 19 WTD 519 (2000), concludes that with respect to transportation equipment, such as containers, the purpose of demurrage or detention charges is to secure compensation for the containers beyond the expected transportation period and to provide a penalty or deterrent against undue detention. The determination also concluded that rather than being a rental charge, demurrage/detention charges are an incidental part of the transportation service. The discussion clarifying when demurrage charges are subject to B&O tax and when such charges are subject to the public utility tax should be incorporated into Rule 211.
  - Det. 99-104, 19 WTD 076 (2000), clarifies that the purchase of tangible personal property for sale and subsequent leaseback is not subject to retail sales or use tax if no intervening use occurs between the initial purchase and the execution of a commitment to lease the property. WAC 458-20-211 currently discusses sale/leaseback transactions only in the context of an exemption provided for the processing/manufacturing of fresh fruits, vegetables and fish. The discussion about how tax generally applies to sale/leaseback transactions should be incorporated into Rule 211.



**3. Additional information:** Identify any additional issues (other than that noted above or in the previous review) that should be addressed or incorporated into the rule. Note here if you believe the rule can be rewritten and reorganized in a more clear and concise manner.

- **ETA 108.12.178, Rental Value of a One-Use Article**, explains the measure of tax when an article of bailment has only one use. A previous review recommended that the ETA be repealed after incorporating the information in WAC 458-20-178 (Use tax). Further review indicates that the information is also pertinent to WAC 458-20-211 and should likewise be incorporated in this rule.
- **ETA 318.04.106/211**, reviewed in conjunction with WAC 458-20-247 (Trade-ins, selling price, seller's tax measures), explains that the sale of tangible personal property from rental inventory is a taxable event because the sale does not represent a casual or isolated sale as contemplated by WAC 458-20-106 (Casual or isolated sales – Business reorganizations). This information directly affects persons leasing or renting tangible personal property and should be incorporated in any revision of WAC 458-20-211.

The ETA also explains that a taxable event occurs when property held for rental is traded in because the ownership in that property is transferred. The buyer receives consideration in the form of a reduced price for the property being purchased. This information was previously incorporated in WAC 458-20-247.

- **WAC 458-20-211** does not discuss how tax applies to the purchase of services rendered in respect to installing, repairing, cleaning, altering, imprinting or otherwise improving tangible personal property held for sale. Because the Department frequently receives questions concerning the taxability of these services, such discussion should be incorporated when the rule is revised.
- The Department has experienced an increase in the number of taxpayers and tax practitioners seeking guidance about how tax applies to leases of tangible personal property between related parties. At such time as the rule is revised, consideration should be given to providing guidance in this area.
- **WAC 458-20-211** currently explains that when the consideration paid does not represent a reasonable rental value, the taxable value shall be determined according to the rental charges made by other sellers of similar property of like quality and character. When the rule is revised, the discussion about reasonable rental value should be expanded to include discussion about what constitutes a reasonable rental value.
- **WAC 458-20-193**, Inbound and outbound interstate sales of tangible personal property, discusses the tax reporting responsibilities of out-of-state lessors. To limit the number of rules a person must refer to concerning leases and rentals, this discussion should be incorporated in WAC 458-20-211.



- For purposes of determining the proper local sales tax rate, WAC 458-20-145 includes discussion of how to determine the place of sale for short- and long-term rentals. Incorporating this discussion in WAC 458-20-211 will reduce the number of rules a person must refer to when seeking information about leasing activities.
- Neither WAC 458-20-211 nor WAC 458-20-19301, Multiple activities tax credit, discuss the tax reporting responsibilities of manufacturers who lease the tangible personal property they manufacture. Det. 99-104, 19 WTD 076 (2000) and Det. No. 89-486A, 10 WTD 305 (1990) discuss this issue. Any revision of WAC 458-20-211 should incorporate the information contained in these determinations.

**4. LISTING OF DOCUMENTS REVIEWED:** The reviewer need identify only those documents that were not listed in the previous review of the rule(s). (Use “bullets” with any lists, and include documents discussed above. Citations to statutes, interpretive statements, and similar documents should include titles. Citations to Attorneys General Opinions (AGOs) and court, Board of Tax Appeals (BTA), and Appeals Division (WTD) decisions should be followed by a brief description (i.e., a phrase or sentence) of the pertinent issue(s).)

Statute(s) Implemented:

Interpretive statements (e.g., ETAs and PTAs):

- **ETA 054.12.211, Flying instructions, airplane rentals, and use tax liability**, explains that use tax applies to the use of property purchased to lease and to use in providing flight instruction.
- **ETA 108.12.178, Rental Value of a One-Use Article**, explains that when an article of bailment has only one use, the measure of tax for use tax purposes is the full value of the article used.
- **ETA 135.04.211, Deductibility of Repair and Maintenance Costs of Leased Property**, explains how tax applies to amounts deducted from by lessees from rental payments for repairs/maintenance that the lessor is obligated to pay.
- **ETA 158.08.211, Deduction of Finance Charges from Lease Payments**, explains how tax applies to amounts designated as finance charges when payments are made under a lease with an option to purchase.
- **ETA 318.04.106/211, Sales and/or Trade-Ins of Tangible personal Property from Rental Inventory**, explains that a taxable event occurs when tangible personal property held for rental is sold or traded in.
- **ETA 337.08.211, Lease Cancellation Payment**, explains that amounts from a negotiated settlement arising from an early lease termination are taxable consideration.
- **ETA 356, Use Tax: Rentals Put to Personal Use**, explains that use tax applies to the use of property held for lease or rental.
- **ETA 357.04.211, Bailments: Handling and Cleaning Charges**, applies a true object test to determine the proper reporting classification for certain additional charges.



- **ETA 447.04.211, Rentals Within and Without Washington**, explains how tax applies to rentals of tangible personal property when use of the property occurs both inside and outside the state.

Court Decisions:

Board of Tax Appeals Decisions (BTAs):

Administrative Decisions (e.g., WTDs):

- **Det. No. 87-4, 2 WTD 127 (1986)**, upheld denial for refund of sales tax when taxpayer's customer purchased and used tangible personal property and then subsequently entered into a sale/leaseback agreement for financing purposes.
- **Det. No. 87-354, 4 WTD 293 (1987)**, explained that a taxpayer may not treat a transaction as a loan for state tax purposes and a sale/leaseback for federal income tax purposes.
- **Det. No. 89-486A, 10 WTD 305 (1990)**, determined that for a manufacturer who leases its manufactured products to lessees both inside and outside the state, the value of the manufactured products for purposes of the manufacturing B&O tax is the cost of the manufactured product when comparable values for the sale of similar items are not available. This is so regardless that the measure of the manufacturing tax differs from that of the retailing B&O tax.
- **Det. No. 90-397, 10 WTD 341 (1990)**, determined that intervening use occurred in a sale/leaseback transaction. The taxpayer failed to correctly execute the procedural and structural requirements necessary for a proper sale/leaseback transaction. In addition, the determination concluded that the measure of tax was not based on a reasonable rental value.
- **Det. No. 89-505, 11 WTD 039 (1989)**, explained that when a lease is prematurely terminated, the nature of the subsequent transaction determines how tax applies to the gross proceeds derived from the transaction.
- **Det. No. 91-260, 11 WTD 423 (1992)**, concluded that the proper measure of tax for tangible personal property manufactured inside Washington for lease or rental outside the state is the gross proceeds of other sales at comparable locations in the state of similar products of like quality and character.
- **Det. No. 89-009A, 12 WTD 1 (1992)**, applied a true object test to determine the sale of a "membership" that includes a membership card and a book identifying merchants who provide discounts when presented with the card is not the purchase of tangible personal property but that of an ability to purchase various goods and services at a reduced price.
- **Det. No. 93-191, 13 WTD 344 (1994)**, found that the purchase of computer equipment and the subsequent sale and lease back of the same equipment were separate, taxable transactions because intervening use occurred before sale/leaseback transaction.
- **Det. No. 94-115, 15 WTD 019 (1994)** applied a true object test to determine that a taxpayer who prepared and distributed samples of a food manufacturer's products was providing demonstration services rather than selling meals.





- **Det. No. 99-027, 19 WTD 044 (2000)**, applied a true object test to determine that surgeons and hospitals were renting tangible personal property and not acquiring medical services because the taxpayer relinquished control and dominion of laser equipment to surgeons for use when performing surgical procedures.
- **Det. 99-021, 19 WTD 37 (2000)**, found that an agreement to lease equipment from a lessor who purchased the property specifically for lease to the taxpayer was a financing lease rather than a true lease of tangible personal property. Determination also found that where the lessor has not properly treated the lease as a financing arrangement and collected retail sales tax on the full amount as an installment sale, the Department may assess the tax against the lessee.
- **Det. 99-104, 19 WTD 076 (2000)**, discussed the tax reporting responsibilities associated with a sale/leaseback transaction.
- **Det. No. 99-147, 19 WTD 447 (2000)**, found the use of tangible personal property by sublease is not subject to use tax when the user paid the sublessor's obligation directly to the lessor and such payment included retail sales tax.
- **Det. No. 99-330, 19 WTD 519 (2000)**, concluded that demurrage or detention charges do not constitute a rental charge, such charges are incidental part of the transportation service.
- **Det. No. 00-024, 19 WTD 710 (2000)**, found that intervening use occurred by a taxpayer who purchased a boat for bare rental yet captained the boat during rental and used the boat for personal purposes.
- **Det. No. 00-72, 19 WTD 1023 (2000)**, distinguished between a true lease and a financing lease and discussed how tax applies to sale/leaseback transactions when the lease is a financing lease. The determination also explained that no intervening use occurs when the documentary evidence establishes the parties were negotiating the sale and leaseback of the property purchased by the taxpayer prior to the purchase.
- **Det. No. 00-073, 19 WTD 1032 (2000)**, applied the true object test to determine that charges for sound and lighting equipment represent a charge for the rental of equipment with operator, a retail sale.
- **Det. No. 99-177, 19 WTD 350 (2000)**, determined that agreement whereby an owner of coin-operated laundry machines placed such machines in apartment buildings did not represent a lease of tangible personal property because the owner did not relinquish complete possession and dominion and control over machines. Owner of machines was found to be the operator.
- **Det. 00-159E, 20 WTD 372 (2001)**, determined where a taxpayer's network provided a computer data protocol conversion service in addition to transmitting data and information over its network to another computer, the true object of the service was found to be the transmission of data and information.

Attorney General's Opinions (AGOs):

Other Documents (e.g., special notices or Tax Topic articles, statutes or regulations administered by other agencies or government entities, statutes, rules, or other documents that were reviewed but were not specifically relevant to the subject matter of the document being reviewed):



The following Tax Topics articles were reviewed:

- Quarter 2, 1995, Mini-storage businesses
- Quarter 4, 1994, Late charges for video rentals
- Quarter 3, 1994, Caterers subject to retail sales tax
- Quarter 3, 1994, Portable toilet rentals
- Quarter 4, 1993, Doing business with the federal government and bailment
- Quarter 4, 1992, Scaffolding correction
- Quarter 3, 1992, Scaffolding (clarification to previous article – subsequently rescinded)
- Quarter 3, 1992, Retail sales tax charged on property tax
- Quarter 2, 1992, Scaffolding rentals (article subsequently rescinded – information in WAC 458-20-211)
- Quarter 4, 1987, Lessee liable for both property tax and retail sales tax on equipment
- Quarter 4, 1987, True leases vs. financial arrangements
- Quarter 2, 1993, July 1, tax law changes (rental of equipment with operator)
- Quarter 4, 1998, Trading in vehicles and your tax liability (with respect to leased vehicles)
- Quarter 2, 1987, Lease payments: temporary move doesn't jeopardize sales tax credits
- Quarter 1, 1987, Leaseback agreements (clarification to previous article)
- Quarter 4, 1986, Leaseback agreements: how are they taxed?

#### 4. Review Recommendation:

|              |  |
|--------------|--|
| <u>  X  </u> | <b>Amend</b>   |
| _____        | <b>Repeal</b> (Appropriate when repeal is not conditioned upon another rule-making action.)  |
| _____        | <b>Leave as is</b> (Appropriate even if the recommendation is to incorporate the current information into another rule.)                 |
| _____        | <b>Begin the rule-making process for possible revision.</b> (Applies only when the Department has received a petition to revise a rule.) |

**Explanation of recommendation:** Provide a brief summary of your recommendation, whether the same as or different from the original review of the document(s). If this recommendation differs from that of the previous review, explain the basis for this difference.

If recommending that the rule be amended, be sure to note whether the basis for the recommendation is to:

- Correct inaccurate tax-reporting information now found in the current rule;
- Incorporate legislation;
- Consolidate information now available in other documents (e.g., ETAs, WTDs, court decisions); or





- Address issues not otherwise addressed in other documents (e.g., ETAs, WTDs, court decisions).

**WAC 458-20-211 should be amended to consolidate information found in multiple documents, to address issues not addressed in other documents, and to further develop discussion on certain existing topics. This recommendation to revise the rule is consistent with the previous recommendation of initiating the rule-making procedure to provide an opportunity for the concrete pumping industry to make public comment concerning whether concrete pumping activities are subject to tax as the rental of equipment with operator.**

**5. Manager action:**    Date: \_\_\_\_\_

\_\_\_\_\_ Reviewed and accepted recommendation

Amendment priority:

- \_\_\_\_\_ 1
- \_\_\_\_\_ 2
- \_\_\_\_\_ 3
- \_\_\_\_\_ 4